

IS THE STATE OF EMERGENCY INQUIRY COMMISSION, ESTABLISHED BY EMERGENCY DECREE 685, AN EFFECTIVE REMEDY?

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The Legal Situation Prior to Emergency Decree No. 685

Following the attempted coup of 15 July 2016, the government of Turkey declared a State of Emergency and has since then issued a series of emergency decrees either directly dismissing public officials as in the case of decrees No. 668, 669, 670, 672, 675, 677, 679, 683 and 686 or by decision of bodies authorized under the emergency decree No. 667. Tens of thousands of public officials have thus been dismissed and consequently subjected to a permanent restriction of their rights associated with public service. Furthermore, hundreds of unions, federations, confederations, private health institutions, private educational institutions, private institutions of higher education (foundation universities),² private radio and television outlets, newspapers and magazines, news agencies, publishers and distributors³ were closed by emergency decrees. In addition 1500 associations and 123 foundations were dissolved.⁴

The appeals against the dismissals and closures afforded no remedies. It is observed that the injured parties have resorted to four separate remedies to challenge the decisions. Three of these are judicial and one is an administrative remedy. Public officials dismissed from office and organisations dissolved by emergency decrees launched either individual or concurrent appeals with administrative bodies, administrative courts, the Constitutional Court and the European Court of Human Rights (ECtHR).

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² 35 private health institutions, 934 private educational institutions, 109 private student dormitories, 15 foundation universities, 19 unions, federations and confederations were directly closed by emergency decrees.

³ A total of 154 broadcasting and print media enterprises were closed by emergency decrees. Among these are 16 television channels, 24 radio channels, 62 newspapers and 5 news agencies.

⁴ For an account of the restriction of rights as of 23 February 2017, see "Fact Sheet on the State of Emergency Measures in Turkey" by Human Rights Joint Platform (IHOP) http://www.ihop.org.tr/wp-content/uploads/2017/03/Fact-Sheet-of-SoE_23022017.pdf

Only a few administrative appeals have resulted in people being restored to their former position. The administrative appeal option is not guided by any rules or principles and thus cannot be regarded as an effective remedy.

Appeals made to administrative courts were rejected with the same reasoning across Turkey. In over 300 administrative court decisions we have access to, the conclusion of the court is that 'Although Emergency Decrees are issued by the Executive branch, they cannot be the subject of judicial review by administrative courts since they function as laws'. Although none of the cases filed to date have been concluded, it is not possible to say that administrative courts are an effective remedy.

The situation is different at the level of the Constitutional Court. Prof. Dr. Engin Yıldırım, Vice-President of the Constitutional Court, noted that **after 15 July 2016, 45,000 applications were filed as of 24 November 2016 and that the number of applications is expected to reach 100,000 by the end of the year.** Yıldırım states '*It is indeed extremely difficult to review 100,000 applications. This is worrying for us*'.⁵ In this period, the Constitutional Court has not yet issued any decisions in these cases and is probably waiting for the problem to be solved by the government.

Lastly, in its pilot judgment in the case of Zihni v. Turkey, the European Court of Human Rights found the application inadmissible on grounds that domestic remedies had not been exhausted.⁶ In its judgment, the ECtHR noted the following:

- a- Appeals lodged with the Administrative Courts concerning the sanction of dismissal from public service under Emergency Decrees are still pending and their outcome is not known; hence as of the date of the current application, one cannot find administrative courts as an ineffective domestic remedy. (para.24)
- b- Furthermore, the amendment introduced to Article 148 of the Constitution on 23/09/2012 allows for individual application to the Constitutional Court once ordinary domestic remedies have been exhausted. The arguments of the applicant are not sufficient to conclude that the Constitutional Court is not an effective remedy in the current case.

As observed, the ECtHR is of the opinion that the two domestic remedies explained above cannot be deemed to be ineffective at least as of the end of November, 2016. However, it is also observed that the Venice Commission, which is another organ

⁵ <http://gazeteyolculuk.net/aktuel/aym-baskanvekili-yildirim-15-temmuzdan-sonra-onumuze-45-bin-basvuru-geldi.html>).

⁶ Zihni v. Turkey, no: 59061/16, 29.11.2016

of the Council of Europe, is not so hopeful of either the administrative courts or the Constitutional Court.⁷ Moreover, the Venice Commission has noted that both administrative courts and individual application to the Constitutional Court are not available to public officials who were dismissed by Emergency Decrees.⁸

Having made this determination, the Venice Commission recommended that the government establish an *ad hoc* commission to review the State of Emergency measures.⁹ The Secretary General of the Council of Europe has made a similar recommendation which was supported by an *ad hoc* sub-committee established by the Parliamentary Assembly of the Council of Europe.¹⁰

Following the above-mentioned developments, the government seems to have realised that it could not keep stalling in response to recommendations by various bodies of the Council of Europe and thus issued Emergency Decree No. 685 establishing the Inquiry Commission for State of Emergency Measures. The timing of the publication of the Emergency Decree betrays its purpose. On the day the Emergency Decree was published, the Parliamentary Assembly of the Council of Europe rejected the request to hold an urgent debate on Turkey. Although there were 94 votes in favour, 68 against and 19 abstaining, the proposal was rejected on grounds that the 2/3 majority had not been reached. It is understood from the statement issued by the PACE Committee on Political Affairs that the Emergency Decree adopted on the same night played a significant role in this decision.¹¹

Both the Constitutional Court and the ECtHR were inundated with individual applications after 15 July 2016. Against the 2212 applications lodged with the ECtHR against Turkey in 2015, the figure rose to 8308 in 2016.¹² Considering that most dismissals and dissolutions have not yet been brought before Strasbourg in the post 15 July context, it is obvious that the sheer volume of applications yet to come risks bringing down the entire ECtHR system if measures are not taken. Indeed, Judge Işıl Karakaş has stated that 2000 new applications from Turkey

⁷ Venice Commission, Opinion on Emergency Decree Laws Nos. 667-676 Adopted Following the Failed Coup of 15 July 2016, CDL-AD(2016)037, para. 200-202.

⁸ Memorandum prepared by Turkish authorities for the visit of the rapporteurs to Ankara, together with the additional documents appended to it (hereinafter – the Government's Memorandum, see CDL-REF(2016)067), s. 31.

⁹ Venice Commission Report, para. 220 ff.

¹⁰ Committee on Political Affairs and Democracy *Ad hoc* Sub-Committee on recent developments in Turkey, Report on the fact-finding visit to Ankara (21-23 November 2016), AS/Pol (2016) 18 rev, para. 62,63.

¹¹ Situation in Turkey: statement by PACE Committee on Political Affairs, <http://assembly.coe.int/nw/xml/News/News-View-en.asp?newsid=6492&lang=2>

¹² European Court of Human Rights (2017), Annual Report, (Strasbourg: CoE), s. 201.

were lodged with the ECtHR in the first month of 2017.¹³ In other words, the number of applications filed in the first month of 2017 is equal to the number of total applications filed in 2015. It is worth noting that any decision issued by the ECtHR to save the moment will yield even more serious consequences. Thousands will come back to the ECtHR couple of years later as the Commission will not provide justice. Asking government to rectify the deficiencies of the Commission at that time will cause unbearable injustice, as that time hundreds of thousands of people will have suffered tremendously.

With respect to the government, the acknowledgement of the Commission as an effective domestic remedy will buy them time. We can put this at between two and ten years. Nearly five months have elapsed since the first dismissals. According to paragraph 2 of Provisional Article 1 of Emergency Decree No. 685, the start date for applications shall be announced by the Prime Ministry and cannot be more than six months as of the publication date of this article. There is uncertainty as to how long it will take for the Commission to start receiving applications as of the announcement date. However, in the best scenario, even if applications are received immediately after such an announcement, the opportunity to make an appeal to the Commission will have arisen one year after the dissolution of organizations closed with the first Emergency Decrees and 10 months after the dismissal of public officials. Although the term of office of the Inquiry Commission is two years under Article 3 of the Emergency Decree, this period is not realistic since the expected number of applications is around 100,000. Consider a case that is rejected by the Commission and administrative courts but accepted at the Constitutional Court. The process before the Commission can last two years and then on top of that a case brought before the administrative courts, including the appeal process, would last another three years, it could take almost 10 years for a person dismissed from office to exhaust domestic remedies, including the Constitutional Court.

Under the circumstances, it is particularly important to evaluate whether the Inquiry Commission is of a nature that meets the requirements of the Council of Europe bodies and whether it is an effective one in light of the case-law of the ECtHR.

The Venice Commission noted that the essential purpose of an Inquiry Commission would be to give individual treatment to all cases. Similarly, it stated that the body would have to respect the basic principles of due process,

¹³ For the interview given by Judge Karakaş to Deutsche Welle, see, "AYM'ye 'süratle karar ver' çağrısı", <http://www.dw.com/tr/aymye-s%C3%BCratle-karar-ver-%C3%A7a%C4%9Fr%C4%B1s%C4%B1/a-37382911>

examine specific evidence and issue reasoned decisions. This body should be independent, impartial and be given sufficient powers to restore the status quo ante and/or where appropriate to provide adequate compensation. The law should enable for subsequent judicial review of decisions of this ad hoc body.¹⁴ In the final section of its report, the Commission made the following recommendations to the government:

*228. The Venice Commission is particularly concerned by the apparent absence of access to justice for those public servants who have been dismissed directly by the decree laws, and those legal entities which have been liquidated by the decree laws. **If, for practical reasons, the re-introduction of full access to court for public servants is impossible in the current conditions, the Turkish authorities should consider alternative legal mechanisms, which might permit individual treatment of all cases and ultimately give those dismissed their “day in court”.** The Venice Commission supports the proposal made by the Secretary General of the Council of Europe concerning the creation of an independent ad hoc body for the examination of individual cases of dismissals, subject to subsequent judicial review.*

The State of Emergency Inquiry Commission, established by Emergency Decree 685, is far from meeting the criteria foreseen by the Venice Commission and the standards adopted in the case-law of the ECtHR. It is obvious that the only function of this procedure is to save time and prolong the process of application to the ECtHR. In an effort to illustrate this situation, the current legal arrangement has been examined under four separate headings.

Analysis of Emergency Decree No. 685

Emergency Decree No. 685 provides two different mechanisms for purged public officials. Article 11 of the Decree designated the Council of State as a court of first instance for the purpose of examining the merits of appeals against measures taken pursuant to Article 3 of Emergency Decree no. 667. Article 3 of Decree No. 667 enabled High Council of Judges and Prosecutor to dismiss judges and prosecutors. First the Constitutional Court¹⁵ and then the ECtHR¹⁶ recognised the new remedy requiring purged judges and prosecutors to apply the Council of State as an effective remedy to be exhausted.

¹⁴ Venice Commission Report, para. 222.

¹⁵ Murat Hikmet Çakmacı Application, no. 2016/35094, 15.2.2017; Hacı Osman Kaya Application, no. 2016/41934, 16.2.2017.

¹⁶ Çatal v. Turkey, no. 2873/17, 07.03.2017.

This article will not discuss the above-mentioned sections of the Decree or the related judgments of the Constitutional Court and ECtHR. It will only deal with the second remedy, namely the State of Emergency Inquiry Commission, which has been mandated to examine procedures instituted directly through the decrees issued under the state of emergency.

Structure

In an effort to introduce a means to stem the flow of cases brought before the ECtHR concerning thousands of village evacuations in Turkey's southeast in the 1990s, in 2004 the Turkish government set up provincial Damage Assessment Commissions, composed of seven members, under Law No. 5233 on Compensation for Damage Arising from Terror and Combating Terror.¹⁷ Although these commissions cover a broad issue, in essence they perform a simple task. Damage Assessment Commissions were established to compensate the damages incurred by people due to acts falling under the Anti-Terror Law and measures taken to combat terrorism. Hence, the commissions only assess whether any damage was incurred on account of such acts and measures without considering whether the actions taken by the government were lawful in the first place.

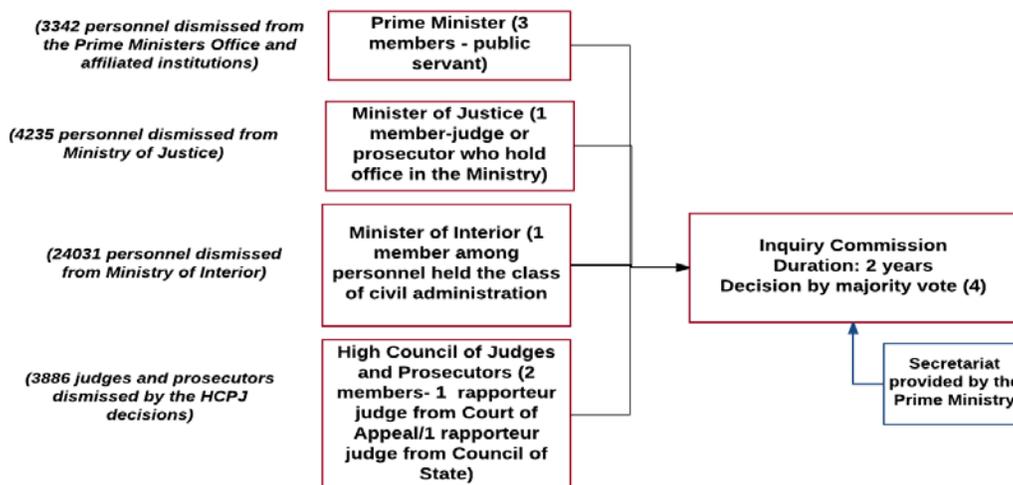
The Inquiry Commission established under Emergency Decree No. 685 is distinct from the commissions established under Law 5233 in that it is a single body with no additional commissions to be established in each province. As elaborated below, while the Commissions under Law 5233 were not tasked with reviewing the merits of administrative procedures, the State of Emergency Inquiry Commission will be reviewing administrative decisions on their merits. In other words, they will be reviewing whether the dismissals from public office and the dissolution of organisations are legally justified. In this respect, they have a heavier workload by comparison. Yet, although the Damage Assessment Commissions were established in each province, the Inquiry Commission under Emergency Decree 685 is a single body based in Ankara.

Owing to the greater political burden it carries, it is understandable that the Inquiry Commission be established centrally and have broader authority. The

¹⁷ In its decision of inadmissibility for the *İçyer v. Turkey* case, the ECtHR noted that the Compensation Commissions were an effective remedy and referred the 1500 cases before the Court to these bodies. See, *İçyer v. Turkey*, no. 18888/02, 12/1/2006. For a review of the ECtHR's decision see, Kerem Altıparmak (2009), "Kopya Davalar ve Pilot Kararlar: Bir Kararda Bin Adaletsizlik", 50. Yılında Avrupa İnsan Hakları Mahkemesi: Başarı mı Hayal Kırıklığı mı? (Kerem Altıparmak, Ankara Barosu Yayınları, Ankara), p. 60 ff.

Commission will, after all, issue decisions about real persons and legal entities who were sanctioned on grounds that they were associated with terrorism. However, the decree shows that this is not the purpose. According to Article 1-2 of Decree No. 685: *‘The Commission shall be composed of seven members. Three members shall be assigned by the Prime Minister from among public officials; one member shall be assigned by the Minister of Justice from among judges and prosecutors who hold office in the central organization of the Ministry of Justice and in related and affiliated institutions; one member shall be assigned by the Minister of Interior from among personnel holding the title of governor; and two members shall be assigned by the High Council of Judges and Prosecutors from among rapporteur judges who hold office in the Court of Cassation or in the Council of State’.*

The decisions of dismissal and dissolution were made by the very same political and administrative authorities who are authorised to appoint the members of the Commission. The fact that the Commission tasked with reviewing the lawfulness of the adopted measures is appointed by the very same authorities who adopted those measures shows that the principles of independence and impartiality were disregarded at the outset.



On the other hand, the Prime Minister has full and unlimited discretion in choosing the members he is authorised to appoint. The members to be appointed by the High Council of Judges and Prosecutors are assigned not from the senior judges but from among reporter judges. Similarly, the Ministry of Justice will assign members from among judges and prosecutors who hold office in the Ministry of Justice. It is evident that the members will not have a high profile or any serious guarantees in their mandate. Moreover, although Article 4 of the Emergency Decree is titled *Guarantees and Rights of Members*, it instead inscribes



a serious lack of guarantee. The article starts off by stipulating that ‘Members cannot be dismissed on any account before their terms of office expire’ but then goes on to list the conditions under which their dismissals can be justified. One of these conditions is particularly interesting: According to Article 4-1 (e):

*A member shall be dismissed by the Commission,
‘if it is found that an administrative investigation was launched or
authorisation was given to start an investigation by the Prime Ministry
against a member on grounds of membership, association, connection or
contact with terrorist organisations or bodies, entities or groups which
are decided by the National Security Council to have acted against the
national security of the State.*

The article mentions no requirement for a judicial or even an administrative decision against a member for him/her to be dismissed; the existence of an administrative investigation is sufficient grounds for dismissal. Membership can be terminated if an investigation is launched by the Prime Minister who has undersigned the decisions of the Council of Ministers for the dismissals and closures. Considering that tens of thousands of people have been dismissed from public office on the same grounds without the opportunity to defend themselves, a Commission member who signs a couple of decisions not favourable to the administration or a member who gives a dissenting opinion could easily be subjected to a similar investigation.

On the other hand, the Inquiry Commission is expected to receive nearly 100,000 applications. It is obvious that a satisfactory examination cannot be conducted with such a high volume of applications. Whereas the damage assessment commissions were established in all provinces under Law 5233, the Inquiry Commission will be performing its duties with only seven people. This increases the importance of administrative support to be provided to the Commission. According to Article 12 of the Emergency Decree, titled ‘Secretariat’, ‘*The secretariat services of the Commission shall be carried out by the Prime Ministry. A sufficient number of personnel shall be allocated to the Commission for performance of these services*’. In other words, the entire staff that will conduct the actual examination on hundreds of thousands of applications and act as rapporteurs to the Commission will be civil servants who report to the Prime Minister within a hierarchy. These staff members also enjoy no guarantees. It is the Prime Minister and not the Commission who has the authority to decide whether they will continue their duties or to be deployed elsewhere.

ECtHR judge, Işıl Karakaş, made a statement in which she noted that the Commission established by Emergency Decree No. 685 is an administrative body

which does not even have quasi-judicial authority and that concerns regarding its independence and impartiality were thus unjustifiable. According to Karakaş, this administrative structure, whose decisions can be challenged at courts, meets the standards of the ECtHR.¹⁸

Leaving aside the fact that it is inappropriate and unfortunate for a judge of the ECtHR to give an opinion on a case which has not yet been brought before the Court, and to do so on behalf of the entire Court, the statement made by Judge Karakaş is clearly wrong in legal terms.

As we have tried to express elsewhere,¹⁹ the dismissal of an individual based on allegations that they have an association or connection with a terrorist organisation in fact qualifies the person in question to be counted as a subject of 'criminal charges' in the light of the ECtHR's 'autonomous concepts' approach.

Persons who are in this case denied the right to defend themselves against criminal charges are now advised to wait for years before an administrative unit which has no judicial authority. Throughout this period, the applicants will continue to bear the label of 'terrorist' and shall not be eligible to work in public services. Moreover, their social security records will show that they were dismissed by an Emergency Decree.

It is expected that individuals who are denied the opportunity to challenge the criminal charges against them for an entire year, will wait before an administrative commission for years and then apply for an administrative judicial review, which, as explained below, has no power to remedy the situation. This is clearly a reversal of the presumption of innocence.

It would only be by coincidence if a fair examination and decision were conducted in such highly political cases by a structure subject to the orders of the executive.

Inquiry and Working Procedure

No investigations were conducted or disciplinary provisions invoked under the Civil Servants Law prior to the dismissal of public officials. Similarly, no investigations were conducted prior to the closure of various organisations. There was no observance of the Press Law, the Law on Associations or the Law on the Establishment and Broadcasting Services of Radio and Television Enterprises in the closure of newspapers, associations or radio and television channels. In fact,

¹⁸ See the interview mentioned in footnote 12.

¹⁹ Kerem Altıparmak/Yaman Akdeniz (2017), Barış İçin Akademisyenler: Olağanüstü Zamanlarda Akademiyi Savunmak, (İletişim: İstanbul), s. 74-80; Kerem Altıparmak (2016), "OHAL KHK'leri "Sivil Ölüm" mü Demek?", <http://m.bianet.org/bianet/siyaset/178496-ohal-khk-leri-sivil-olum-mu-demek>

the 5th Chamber of the Council of State describes such measures as follows: *'as opposed to sanctions imposed in the case of criminal acts or disciplinary offenses, expulsion from a profession or dismissal from public office are permanent emergency measures that produce definitive outcomes and aim to end the existence of terrorist organisations and bodies considered to act against national security in public agencies'*.²⁰ The Constitutional Court uses the same expression in the decision by which it dismisses its own members.²¹

In the adoption of this emergency measure, no charges were brought against the subjects of the decisions in most cases. People were denied the right to make a defence and the basic principles of disciplinary law were disregarded. Moreover, instead of suspending the individuals in question and conducting an investigation in the meanwhile, these persons were directly dismissed.

On the other hand, the rule which is the basis of the dismissals is a rule which could not have been foreseen in advance. According to Emergency Decree 685, applications to the Commission can be made to challenge actions taken directly within the provisions of emergency decrees in the absence of any other administrative actions, on grounds of membership, association, connection or contact with terrorist organisations or bodies, entities or groups which are decided by the National Security Council to have acted against the national security of the State.

None of the emergency decrees give a description of the bodies, entities and groups decided by the National Security Council to have acted against the national security of the state. Moreover, the grounds of having association and contact with these groups are unknown concepts that have never before been heard. As already noted above, even if the concepts used are defined as administrative sanctions, they are in fact **'criminal charges'** within the scope of the ECHR.

This is particularly important in that the individuals and organisations concerned were denied the presumption of innocence in the absence of an opportunity to defend themselves, to present evidence, bring witnesses, debate and refute the allegations made against them. It is a matter of debate whether it would be fair to offer reparation after an investigation that will last years without restoring their position in public service. Yet, this is not the only problem that arises due to the modus operandi of the Commission. The working procedures of the Commission are far from addressing the procedural shortcomings leading to the dismissals.

²⁰ Council of State 5th Chamber, E. 2016/8196, K. 2016/4066, k.t. 04.10.2016.

²¹ E. 2016/6, K. 2016/12, 4.8.2016, para. 79.

According to Article 13 of the Emergency Decree, ‘The procedures and principles concerning the applications and the functioning of the Commission shall be set forth and announced by the Prime Ministry upon the proposal of the Commission’. The provision shows that the procedures for the functioning of the Commission have no legal guarantee. Moreover, according to Article 9, ‘The Commission shall perform its examinations on the basis of the documents in the files’.

The fact that the Commission shall examine applications based on files entirely eliminates the opportunity to make a defence. The individual or institutions in question were sanctioned ‘on grounds of membership, association, connection or contact with terrorist organisations or bodies, entities or groups which are decided by the National Security Council to have acted against the national security of the State’. However no information has been given to them as to which bodies, entities or groups they are alleged to be involved in or which behaviour constituted connection or contact. Under the circumstances, the person or institution making a written application can say one of two things. They will either have to say ‘I am not involved in any bodies, entities or groups’ or they will have to explain how they are not involved in individual organisations as they see relevant.

This method is against Article 38 of the Constitution, which reads ‘*No one shall be compelled to make a statement that would incriminate himself/herself or his/her legal next of kin, or to present such incriminating evidence*’ as well as the principle of the right to remain silent and not be forced to self-incrimination, which is a general international principle constituting the foundation of the right to a fair trial in the judgments of the ECtHR even if it is not explicitly noted.²²

This procedure forces people and institutions to acknowledge a crime of which they were not informed at any stage and then to make a suitable defence. The person applying to the Inquiry Commission will first need to choose a crime and then make their defence as to how they did not commit that crime.

Guaranteeing the right to defence in criminal cases is one of the essential principles of a democratic society. Article 6 of the Convention should be interpreted to guarantee not rights that are theoretical or illusory but rights that are practical and effective.²³ As underlined by the ECtHR on numerous occasions, public interest, no matter how demanding, cannot justify sacrificing the right to a fair administration of justice. The general requirements of fairness embodied in Article 6 apply to proceedings concerning all types of criminal offence, from the

²² Saunders v. United Kingdom, 17/12/21996, ECHR 1996-VI.

²³ Artico v. Italy, no. 6694/74, 13.5.1980, para. 33

most straightforward to the most complex.²⁴ For this reason, the ECtHR has found in some cases that a procedure as a whole is against the principle of fairness without finding a specific violation of Article 6.²⁵

The principle of the equality of arms requires that the parties facing the allegations have a reasonable opportunity to make a defence without facing serious disadvantages. The ECtHR observes that the primary purpose of procedural rules is to protect the defendant against any abuse of authority.²⁶ Furthermore, the right to an adversarial trial is valid for both criminal and civil cases and requires that the parties be given the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party.²⁷

The State of Emergency Inquiry Commission provides none of the procedural guarantees required for bodies employing a judicial method. In this case, what will the Commission base its decisions on? Since the injured party is not informed of any charges, the Commission will have to decide based on the information and documents held by the executive. What authority does the Commission have in examining these documents? Article 5 of the Emergency Decree answers this question with the following words: *'Without prejudice to the provisions of the legislation related to the confidentiality of investigation and the State secrets, public institutions and organizations as well as judicial organs are obliged to submit to the Commission all kinds of information and documents it needs within the scope of its duties, without delay, or to make them available for an on-site examination'*.

At first glance, it may appear that the Commission will have access to all documents held by at least the administration. However, the persons dismissed were dismissed on account of their activities in relation to terrorist organisations. There is a probability that an investigation was started against these people and that it constitutes a State secret. According to Article 47 of the Criminal Procedures Law, 'Information which would undermine the foreign relations, national defence and national security of the State or pose a threat to the constitutional order and foreign relations if disclosed shall be considered a state secret'. When information is requested and the administration says 'these are state secrets, we cannot disclose them', the Commission has no authority to acquire this information. There are also no rules in the Emergency Decree allowing the applicant to challenge this or any other provision of the procedure.

²⁴ Teixeira de Castro v. Portugal, no. 25829/94, 9.6.1998, para. 36

²⁵ Van Kück v. Germany, no. 35968/97, 12.6.2003, para. 55 ff.

²⁶ Coeme v. Belgium, no. 32492/96, 22.6.2000, para. 102.

²⁷ Ruiz Mateos v. Spain, no. 12952/87, 23.6.1993, para. 63

Another point about the working procedure of the Commission is worth noting. Even if no further emergency decrees are issued after this point in time, the Inquiry Commission is expected to receive nearly 100,000 applications. It is expected that a commission composed of seven members will examine and conclude 100,000 applications in a period of two years. A rough calculation shows that 250 applications must be examined and concluded in a single workday. Since at least four members need to vote in each decision, each member is required to be a rapporteur for 35 files per day as well as to debate and sign at least 100 decisions. It would not be an exaggeration to say that this is an impossible task and that the Commission will instead make automatic decisions based on the intelligence reports brought before it.

Nature of Decisions

In order for a remedy to be deemed effective according to Article 34 of the Convention, it must be capable of undoing the violation where possible or to undo its effects to the extent possible. To achieve this, the situation of the victim should be restored to what it was before the violation occurred (*restitutio in integrum*).²⁸

However, with most human rights violations, it may not be practically possible to restore the conditions that existed before the violation took place. As noted by the International Law Commission, there is a requirement to compensate the damage suffered insofar as such damage is not made good by restitution. Where this is not possible, other means of satisfaction can be introduced.²⁹ Hence, the primary aim is to restore the *status quo ante* to the extent possible. Where this is not possible, the aim is to provide the means of compensation that would allow for a solution as close as possible to the former conditions. The International Law Commission accepts that the test of whether restitution is possible requires that it is a) not materially impossible, b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.³⁰

The primary purpose of the ECHR is to re-establish the conditions that existed before the violation occurred. In its judgment in the case of *Papamichalopoulos v.*

²⁸ See, Permanent Court of International Justice, *The Factory at Chorzów (Indemnity)* (Germany v. Poland) for an explanation on how *restitutio in integrum* is the primary means of reparation in international law, PCIJ, Ser. A., No. 17, 1928, p. 47; *Democratic Republic of Congo v. Belgium*, 14.2. 2002, ICJ Report 2002, p.3. Draft Articles on Responsibility of States for Internationally Wrongful Acts, prepared by the International Law Commission and adopted by the General Assembly, UN Doc. No. A/56/10, Article 30 and the interpretation of the Commission. (Draft Articles on Responsibility of States), art. 35 and the comments of the Commission.

²⁹ Draft Articles on Responsibility of States, art. 35-37. The draft Articles set forth restitution, compensation and other means of satisfaction. Where restitution is sufficient for reparation, no other means of reparation shall be sought.

³⁰ Draft Articles on Responsibility of States, art. 35.

Greece, the ECtHR has noted that a judgment in which the Court finds that the Convention was violated gives rise to the responsibility of the respondent State to put an end to the violation and re-establish, to the extent possible, the situation which would, in all probability, have existed if that act had not been committed (*restitutio in integrum*).³¹

For this reason, the payment of compensation is not an alternative to *restitutio in integrum*. Compensation is a measure resorted to only when the nature of the violation or the domestic law does not provide for restitution.³² In other words, it is to provide reparation solely for damage suffered by those concerned to the extent that such events constitute a consequence of the violation that cannot otherwise be remedied.³³ For example, the violation of the right to life and the prohibition of torture are violations that are irreversible, however alternative remedies must be proportionate to the gravity of the violations.³⁴ As a consequence, where restitution is not possible, the alternative means of reparation must provide a solution as close as possible to the conditions that existed before the violation.

In its judgment in the case of *Scozzari and Giunta v. Italy*, the Court noted that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress as far as possible the effects.³⁵ In its judgment in the case of *Salah v. The Netherlands*, the Court compared articles 41 and 46 and stated that the primary responsibility of the state was to put an end to the violation and to redress the effects thereof and that the general and individual measures to be adopted were more important than sums awarded by way of just satisfaction.³⁶

Based on this caselaw, we can conclude that the primary course of action should be to end an ongoing violation, then to restore, to the extent possible, the

³¹ Papamichalopoulos/- v. Greece (Article 50), 31.10.1995, Series A no. 330-B, para. 34; Assanidze v. Georgia (BD), no. 71503/01, ECHR 2004-II, para. 197; Maestri v Italy, no. 39748/98, ECHR 2004-I, para. 47.

³² De Wilde, Ooms and Versyp ("Vagrancy") v. Belgium (Article 50), Series A no. 12, para. 20.

³³ Scozzari and Giunta v. Italy (BD), nos. 39221/98 and 41963/98, ECHR 2000-VIII, para. 250.

³⁴ The Court determined the relationship between impossibility of restitution and compensation in case involving the strip-search of inmates. According to the Court, compensation must be awarded since there is no possibility of restitution. *Salah v. Netherlands*, no. 8196/02, 6.7.2006, para. 75

³⁵ Scozzari and Guinta v. Italy, 13.7.2000, para. 249.

³⁶ *Salah v. Netherlands*, no. 8196/02, 6.7.2006, para. 71.

conditions that existed before the violation occurred and to redress its effects, and finally to compensate for the damage suffered as long as the violation continued.

In order for means of reparation to be deemed effective in cases involving dismissal from public office and dissolution of organisations and institutions, the wrongful decision should be reversed and the material and moral damages incurred should be compensated for.

According to Article 9 of the Emergency Decree No. 685, the Inquiry Commission will be able to decide whether to accept or reject the application after it conducts an examination. The conditions required for the application to be accepted are set forth under Article 10. Accordingly:

“ARTICLE 10 – (1) In case of acceptance of the application concerning those who were dismissed from public service, the decision shall be notified to the State Personnel Administration. The appointment proposals of the personnel notified in this manner shall be made, within fifteen days, by the State Personnel Administration, having regard to province they reside in, for the positions appropriate to their former status and titles in the public institutions and organizations apart from the institutions in which they were employed; except for those whose assignments in other institutions are not possible due to their status, titles and the duties they performed. [...]

(2) In cases of acceptance of the applications concerning the closed institutions and organizations, the relevant provisions of the emergency decree shall be deemed to be annulled with all effects and consequences for the particular institution in question, as of the date of publication of the emergency decree.

This rule is likely to give rise to several consequences. Firstly, the decision is not one of annulment. Although the decision makes a determination that the initial procedure was unlawful, the procedure is not annulled. Hence, it is not the case that the *status quo ante* is restored for the person or organisation involved. On the contrary, the rule states that such persons will be appointed to cadres and positions corresponding to their former status and titles in public agencies and institutions **other than the institutions where they were previously employed**. For instance, a faculty member at Istanbul University who was wrongfully dismissed from public service will not return to Istanbul University but instead will be appointed to a university in another province. It is difficult to understand why a person would be appointed to a post different from his earlier one since his unemployment was a result of the wrongdoing of the State.

On the other hand, since the decision issued by the Commission is not one of annulment, it only has a prospective effect and no retroactive one. As mentioned earlier, at the time the Commission starts working, one year will have elapsed since the first dismissals and ten months will have elapsed since the first dissolutions. If the Commission composed of seven members is able to accomplish the super-human feat of concluding 250 files per day, it could complete all applications within a period of two years. However, it is evident that this is not possible. Some applications will be concluded in three to four years. Under these circumstances, a television channel closed in September 2016 will be able to restart broadcasting in 2020 if a favourable decision is issued.

The same holds true for an association which was dissolved. In some provinces, there are no oppositional associations left. Almost all TV stations and newspaper critical of the government have been closed in the process. Hence, the decisions to be issued will have a large impact both materially and politically.

Those applications which are rejected will be given the opportunity to appeal to administrative courts. This will mean an additional two or three years spent at the appeal stage. The emergency decrees enforcing the dismissals prevents the persons involved from working in public service both directly and indirectly and makes it impossible for individuals to leave the country since their passports are withdrawn (both official and ordinary passports). This means that a faculty member who is dismissed from public service will be unemployed for six years at the end of which she will receive no compensation whatsoever even if it is determined that she was wrongfully dismissed.

It is also not possible for a person to demand the awarding of damages under general provisions. Firstly, general provisions do not have applicability in this situation. As explained above, the Commission does not have the authority to annul a former decision. The Commission does not annul a decision but rather issues a decision in line with Article 10 of the Emergency Decree. While Article 12 of Law No 2577 on Administrative Proceedings states that 'In cases where an action of annulment has been filed and decided, a full remedy action can be filed within the time limit to bring a lawsuit as of the date of the notification of such a decision or the date of notification of a decision issued by a court of law or as of the date of execution of a decision giving rise to damages', this article will not be applied to decisions issued by the Commission.

Secondly, the procedure which gives rise to damages is not a decision of the Commission but a procedure instated by the Emergency Decree. Decree 685 does not offer the option of judicial remedy for the procedure enforced by the Emergency Decree. As explained below, the judicial remedy foreseen in the

Emergency Decree is an action of annulment of a decision by the Inquiry Commission. Courts will not be able to review whether the Emergency Decree is lawful but only be able to annul a Commission decision. In this case, the time limit to file a lawsuit for damages suffered due to the Emergency Decree procedure is the general time limit specified under Article 7 of the Administrative Procedures Law. This time limit is 60 days and will have long expired by the time a decision is issued after six years. Thus, neither the dismissed individuals nor the closed organisations and institutions will be compensated through the Commission for the hundreds of thousands or millions of Liras of damages they have suffered due to the wrongful procedures against them. Many people will be unemployed throughout this time and their private and family lives will be ruined.

It is clear that a decision of this nature cannot be regarded as an effective remedy.

Judicial Review

As far as we have observed, some experts consider that all these shortcomings can be addressed due to the availability of the guarantee of a judicial review and hold that the ECtHR would accept the Commission to be an effective remedy because of this rule. Based on this guarantee, Judge Karakaş states that the shortcomings in the administrative structure should not be regarded as a problem.³⁷ We are of the opinion that this is also extremely wrong.

In order for the judicial remedy to be considered an effective one, it should be able to do away with the above-mentioned shortcomings. However, it is not possible for the judicial remedy foreseen to achieve this. The proposed judicial remedy only introduces an additional burden which will delay application to the ECtHR by up to ten years.

As underlined above, only a single type of case is foreseen to challenge decisions of the Commission. According to Article 11 of the Emergency Decree, 'An action for annulment of decisions of the Commission may be filed with the Ankara administrative courts determined by the High Council of Judges and Prosecutors'

Firstly, rather than giving the opportunity to appeal to an ordinary judge, the rule foresees a judicial review by administrative courts 'determined' by the High Council of Judges and Prosecutors. Considering the institutional problems of the High Council of Judges and Prosecutors and judicial organs in Turkey, this poses a problem in itself. Moreover, according to this rule, an appeal can be made only against a decision of the Commission and not the Council of Ministers which instated the initial procedure against an individual or organisation, or the Emergency Decree which was the source of the procedure.

³⁷ See the interview referred to footnote 12.

The claim of the person who applies to the Commission will be that he/she does not have any membership, association, connection or contact with terrorist organisations or bodies, entities or groups which are decided by the National Security Council to have acted against the national security of the State. It is unknown how this was decided in the initial procedure against the persons involved. Hence, an individual will be appealing against this decision but will be unable to make an effective defence since he/she will have no idea how this conclusion was reached in the first place. However, since the individual concerned is still deprived of opportunity to make an effective defence at the stage of administrative proceedings, he/she will not be able to claim the unlawfulness of the initial procedure. This is because the Emergency Decree allows for an examination only of the file and does not provide for an effective defence.

On grounds that Emergency Decree 685 is a State of Emergency Decree, it was found by the Constitutional Court that its conformity with the constitution cannot be reviewed by the Constitutional Court.³⁸ As we have examined in the section on Inquiry and Working Procedures, the procedure governing the Commission is far from meeting the criteria for a fair trial under both the Constitution and the ECHR. Moreover, because the provisions of the Emergency Decree cannot be annulled or determined to be unlawful, the decisions of the Commission cannot be annulled since they only issue decisions based on examination of a file in contradiction to the principles of a fair trial.

This situation can be explained with an example. Let us imagine that the testimony of another employee had an influence in dismissing a public official. The individual will not have access to this testimony against him, will be deprived of the opportunity to provide evidence and will be unable to challenge that person in line with the principles of equality of arms and adversarial proceedings. The Inquiry Commission will be basing its decision on the file, as foreseen in the Decree, and will be rejecting the application. Bearing in mind that the Emergency Decree itself cannot be annulled, the administrative court will not be able to reverse the decision of the Commission on grounds that it is unlawful. Under the circumstances, the Commission will have issued its decision based on the file within the limits of its mandate. It is not possible for it to go beyond these limits and afford judicial guarantees. Since the provisions of the Emergency Decree are clear, the administrative court will not be able to question the Commission as to why it did not hear witnesses or the applicant or why it failed to observe the principle of equality of arms. The administrative court will thus be unable to annul the decision of the Commission. For this reason, a court decision is not sufficient

³⁸ AYM, E. 2016/166, K. 2016/159; E. 2016/167, K. 2016/160, k.t. 12.10.2016.

to do away with the procedure observed by the Commission – a procedure which is contrary to the ECHR.

As observed above, despite the initial impression that judicial guarantees are being granted, no such guarantees exist. Nor is it possible for the judicial authority to issue any decisions about the initial administrative procedure which was decided at the discretion of the authorities. Hence, the judicial remedy foreseen to challenge decisions of the Commission is meaningless.

The Legitimacy of the Ex Post Facto Legal Remedy

According to the ECHR, the domestic remedies which must be exhausted are the domestic remedies which exist at the time the violation occurred. As explained in the introduction, there are no domestic remedies available at the time of the dismissals and closures under the Emergency Decrees. Although the ECtHR has reached a different conclusion in the case of *Zihni v. Turkey*, it was quickly understood that this decision was not correct. The remedy introduced by Emergency Decree 685 is an exceptional one. The ECtHR has accepted in various judgments that there may be exceptions to the rule requiring for a domestic remedy to be available at the time of the violation.³⁹

Particularly after the adoption of the pilot judgment method by the ECtHR, it is observed that the Court made institutional exceptions to this general principle. It is observed that in its pilot judgments, the ECtHR accepts quasi-judicial mechanisms introduced by governments to be effective remedies especially in cases involving the violation of the right to be tried within a reasonable time⁴⁰, the settlement of past violations of the right to property through compensation⁴¹, violations caused by court decisions that have not been executed for a long time⁴², ill-treatment arising from prison conditions. There are three examples in this regard, which are particularly important for Turkey. The ECtHR has recognised the Damage Assessment Commissions, which were established by Law No. 5233 on Compensation for Damage Arising from Terror and Combating Terror⁴³, the

³⁹ *Baumann v. France*, no. 33592/96, 22.5.2001, para. 47; *Brusco v. Italy*, no. 69789/01, 06.09.2001.

⁴⁰ *Taron v. Germany*, no. 53126/07, 29.05.2012; *Techniki Olympiaki A. E. V. Greece*, no. 40547/10, 01.10.2013; *Valcheva and Abrashev v. Bulgaria*, no. 6194/11, 18.6.2013.

⁴¹ *Michalak v. Poland*, no. 24549/03, 1.3. 2005; *Hutten-Czapska*, no. 35014/97, 19.6.2006; *Zadric v. Bosnia Herzegovina*, no. 18804/04, 16.11.2010; *Preda and Others v. Romania*, no. 9584/02, 29.4.2014.

⁴² *Nagovitsyn and Nalgiyev v. Russia*, no. 27451/09, 23.9.2010 (The ECtHR later reached the decision that there was no effective remedy in Russia. *Kalinkin and Others v. Russia*, no. 16967/10, 17.4.2012).

⁴³ *İçyer v. Turkey*, no. 18888/02, 12.1.2006.

Compensation Commissions under Law No. 6384 on the Settlement of Cases Brought Before the ECtHR Through Compensation⁴⁴, the Immovable Property Commissions established in the Turkish Republic of Northern Cyprus under Law No. 67/2005⁴⁵ as domestic legal remedies established after the violation.

In cases like these where there are mass violations, this method is clearly an effective one to address not only the violations voiced by the applicants, which are the tip of the iceberg, but violations committed against thousands more. However, the domestic legal remedy instated by Emergency Decree 685 is in many aspects distinct from these other remedies accepted by the ECtHR.

Firstly, the ex post facto domestic remedies accepted by the ECtHR mostly involve prolonged proceedings, failure to execute judgments and the reinstatement of property rights.⁴⁶ The situation of persons is almost the same across all these cases. Hence, the domestic remedy offered is not one which requires a separate investigation or examination. If there is a violation, a mathematical calculation is performed. Therefore, the above-mentioned problems concerning the composition or the modus operandi of the Commissions established by Emergency Decree 685 are not encountered in such cases. For example, in the case of an individual who suffers damages due to prolonged proceedings, it will be sufficient to apply the caselaw of the ECtHR, which has become the standard, to decide on an award of compensation. There is no problem in delivering such a decision based on the file.

However, Emergency Decree 685 sets forth the procedure by which decisions will be made about tens of thousands of people who have not undergone an investigation or been given the right to defend themselves. It is obvious that such an examination cannot be conducted in a mechanical way. The State of Emergency Decrees are similar to cases concerning lustration rather than cases about property or prolonged proceedings in the ECtHR caselaw.⁴⁷ The situation of a public official dismissed on grounds of membership of a terrorist organisation and the situation of an association dissolved on grounds of having relations with a terrorist organisation are still criminal charges within the meaning of the ECtHR caselaw. A proper examination of criminal charges could only be conducted with

⁴⁴ *Turgut and Others v. Turkey*, no. 4860/09, 26.3.2013 (however, see, *Behçet Taş v. Turkey*, no. 48888/09, 10.3.2015).

⁴⁵ *Demopoulos and Others v. Turkey*, no. 46113/99, 01.03.2010.

⁴⁶ An important exception is the case of 13426 people whose citizenships were erased in Slovenia. However, even this case is not one in which each person has a distinct case. It is an issue where everyone faces the same treatment. *Anastasov and Others v. Slovenia*, no. 65020/13, 18.10.2016.

⁴⁷ For detailed information, see, *Altıparmak/Akdeniz*, p. 74 ff.

the fair trial guarantees recognised in the ECHR. All other methods are bound to be against the principles and spirit of the ECHR.

For this reason, the Venice Commission has underlined that the *ad hoc* mechanism to be established should be capable of giving individual treatment to all cases. This requires that the structure to be established should be in conformity with the principles of fair trial to examine specific pieces of evidence and to issue reasoned judgments.⁴⁸ Neither the State of Emergency Inquiry Commissions nor the administrative court proceedings offered to challenge the decisions of the Commission are capable of providing these guarantees.

Under the circumstances, it is crucial that the ECtHR issue a judgment finding a violation to guide the government without waiting for the work of the Commission and/or the administrative court decisions. It is particularly critical that such a judgment be issued as a pilot case which includes a detailed account of what must be done to ensure that any domestic legal remedy to be established is in conformity with the basic principles listed in the decision of the Venice Commission. In the event that the ECtHR chooses to issue judgments only after the finalisation of the process before the Commission and the administrative courts, this will have a devastating effect undermining the entire human rights protection mechanism and will lead to irreversible damage being suffered by hundreds of thousands of people.

⁴⁸ See, footnote 12 and the relevant text.